UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re: Gershon Barkany, Debtor.	Chapter 7 Case No. 8-14-72941-las
Mark A. Pergament, as Chapter 7 Trustee of the Estate of Gershon Barkany, Plaintiff, versus Barkany Asset Recovery and Management LLC, Cortland Realty Investments LLC, Marshal Eisenberg, Debra Eisenberg Wilder, Seth Farbman, SSS, LLC, Rachell Gober, The Boss's Daughter, LLC, Shalom Maidenbaum, Anthony Montilli, Jordan Most, Janet Pinsky, Chaim Silberberg, Mr. San, LLC, Gerald Pinsky, Moshe Schreiber, Leah Schreiber, Central Strategies, LLC, MLS Resources, LLC, and Mordechai Hellman, Defendants.	Adv. Pro. No. 8-16-08146-las

REPLY OF BARM PARTIES IN SUPPORT OF CHAPTER 7 TRUSTEE'S MOTION FOR ENTRY OF AN ORDER APPROVING THE SETTLEMENT AGREEMENT DATED FEBRUARY 7, 2017

TO: THE HONORABLE LOUIS A. SCARCELLA
UNITED STATES BANKRUPTCY JUDGE

Barkany Asset Recovery & Management, LLC ("BARM") and the individual Defendants other than Anthony Montilli named above (collectively, the "BARM Parties") respectfully submit this reply in support of the Chapter 7 Trustee's (the "Trustee") motion for entry of an order approving the Settlement Agreement dated February 7, 2017 by, between and among the Trustee and the BARM Parties (the "Motion") and in opposition to the objection (the

"Objection") filed by Joseph Rosenberg, Jonathan Zelinger, Ethical Products Inc. and Petex International Limited ("Objectors").[1]

1. Mr. Pergament and BARM have spent substantial amounts of time on this matter, both during the earlier period when the Trustee was the interim trustee and during the current period since Mr. Pergament was appointed as permanent trustee. The proposed settlement will provide substantial value to the estate, both in cash and in other value, especially given the rights that the estate wants to pursue.

2. The Objection is the Objector's latest presentation of unsubstantiated contentions based on false statements, half-truths and innuendo, often presented under the rubric of "on information and belief." [2] BARM respectfully submits that the Court should summarily overrule the Objection and grant the Motion.

Barkany did not provide Exhibits 1 and 2 to BARM or Locke Lord.

3. Paragraph 1 of the Objection states "on information and belief" that Barkany presented to Locke Lord LLP ("Locke Lord") the schedules attached to the Objection as Exhibits 1 and 2. This statement is not correct, and the BARM Parties do not know, nor do the Objector's state, their basis for claiming that BARM received either schedule. Barkany provided BARM with a similar schedule, but he did not provide them Exhibit 1 or Exhibit 2. In any event, BARM's investigation determined relatively quickly that (i) the scheduled liabilities appeared to

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[1] Jonathan Zelinger, Ethical Products Inc. and Petex International Limited have asserted only contingent claims against the estate, claims that will ultimately be disallowed or subordinated. They will receive no distributions and thus are without standing. Joseph Rosenberg ought not to be recognized as having standing as the non-contingent claim that he has filed is, the BARM Parties contend, wholly without merit. His claim, however, has not yet been disallowed.

[2] For example, the Objectors claim that the BARM Parties knew or should have known that funds they received were the product of illegal activity and that they actually received funds directly or indirectly from the parties identified in the Objection. The BARM Parties specifically deny this claim, except, and to the extent, as expressly stated herein.

include interest and profits which resulted in a substantial inflation of certain of the listed claims and (ii) certain of the persons listed in the schedule had already been repaid. It is unclear what the Objection seeks to demonstrate in referring to these schedules. If the Objectors' point is that there were other creditors, then they have failed to explain why these purported creditors never came forward to BARM. Nor do the Objectors explain why these phantom creditors never filed proofs of claim. The Objectors similarly fail to explain why Rosenberg paid BARM hundreds of thousands of dollars without asserting that he was a creditor until *after* BARM took legal action against him.

BARM and Barkany did not agree that BARM would distribute assets among all of Barkany's creditors, including Rosenberg.

4. Paragraph 2 of the Objection states, again "on information and belief," that Barkany agreed to transfer all of his assets to BARM for all of his creditors, including Rosenberg. Again, Objectors' information and belief is incorrect. Barkany did not make, and BARM did not receive, such a general assignment for the benefit of all of his creditors. It was clearly understood by Barkany that BARM was receiving assets for distribution only to Locke Lord's clients. Also, Barkany repeatedly told Locke Lord that Rosenberg was not owed anything.[3]

Until Barkany's arrest, BARM had no knowledge or reason to suspect that he may have engaged in post-2010 illegitimate business transactions.

5. In its paragraphs 2 and 3, the Objection intimates that Barkany told BARM or gave it reason to believe that he would continue to engage in fraudulent activities. That, too, is

[3] Additionally, it is difficult to square Rosenberg's contention that BARM was operating for his benefit with the fact that he transferred $730,000.00 to BARM for Barkany's benefit in 2011 and 2013 while claiming to be a creditor himself. Not once during his interactions with BARM did Rosenberg claim to be a creditor or ask to be included within the group that would receive distributions of assets collected by BARM.

not correct. As BARM's then manager, David Belsky, states in the Declaration submitted with this Reply, at no time prior to his arrest did Barkany reveal that in and after 2011 he had engaged in transactions such as those alleged in the Objection or in any other similar transactions. BARM was not aware of any such transactions until after Barkany's arrest, and until Barkany's arrest Mr. Belsky was not aware, and had no reason to believe or suspect, that any funds BARM received from Barkany, Rosenberg or others may have been misappropriated from any of the persons or entities alleged in the Objection to be victims of Barkany's alleged post-2010 fraudulent activities.

6. Barkany had confessed to his fraud and assured BARM that his criminal activities were over. He gave no indication that he was doing anything illegal. He occasionally mentioned efforts to engage in new, legitimate, businesses such as the oil and gas business that he mentioned to BARM shortly before his arrest. Indeed, even after he was arrested, the Court and the Government allowed him to remain free and to travel across the country to pursue these types of business activities based on his representation that he would do so in a legal manner. BARM relied on Barkany's same assurances to the same extent as did the Court and the Government.

7. Locke Lord would not have condoned anything other than legitimate business activities. Just as the United States Attorney saw no reason to imprison Barkany until over two years after his arrest (when he was caught in new acts of dishonesty) because of the possibility that he would be able to make at least some restitution, BARM saw no reason not to allow Barkany that same opportunity. Barkany confessed to his fraud and he assured BARM that his criminal activities were ended and that he would engage only in legitimate attempts to earn money.

From early 2011 until after Barkany was arrested, BARM had
no access to records concerning Barkany's post-2010 activity.

8. Upon discovery of Barkany's fraud in late 2010, Barkany gave BARM access to the financial records he then had and sat for interviews to explain them. Those records concerned the beginning of 2011, 2010 and prior years. Until after Barkany's arrest, BARM had no access to records Barkany may have generated thereafter. After Barkany's arrest, Rosenberg and Zelinger produced approximately 1,200 pages of heavily redacted records pursuant to subpoenas served by BARM. Despite the redaction, to the extent that their records reveal much about Barkany's post-2010 activities, it is apparent that Rosenberg and Zelinger had extensive financial transactions with Barkany.

BARM's cash collections from or for the benefit of Barkany.

9. Subsequent to uncovering Barkany's Ponzi scheme, BARM collected cash from Barkany and his relatives in three tranches. First, in the first half of December 2010, Barkany turned over less than $200,000.00 of cash to BARM. Second, during 2011 BARM collected $850,000.00 pursuant to a written agreement under which Barkany's relatives were to provide funds in return for BARM's agreement to forgo the sale of Barkany's residence to an unrelated third party. Third, in February and March 2013 BARM collected $270,000.00 of what BARM believed were funds provided by Barkany's relatives as advance payments on a settlement of BARM's potential claims against members of Barkany's family, including Rosenberg and Zelinger, that was then being negotiated. Additional information concerning each of these tranches is presented in the following paragraphs.

10. First tranche. Immediately after Barkany confessed to his fraud, Barkany turned over to BARM the balances held in his and his entities' bank accounts. The amounts turned over included $47,702.00 from accounts in Barkany's name, $137,414.00 from accounts in Morgan

86, Inc.'s name and $6,925.00 from accounts in Pratt Lenders' name, for a total of $192,041.00. Inasmuch as Barkany had only recently stolen tens of millions of dollars from Locke Lord's clients and told BARM that he had barely $200,000 left, BARM believed and continues to believe that these funds were part of the funds stolen from Locke Lord's clients.

11. Second tranche. By agreement dated as of January 5, 2011, Barkany agreed to cooperate with Locke Lord's clients in making restitution, and he thereafter agreed to market for sale certain residential properties, including his residence.[4] By letter agreement dated May 20, 2011, Barkany assigned the proceeds of the sale of his residence to BARM. A bona fide third party made an offer to purchase property, but on June 6, 2011, Barkany and BARM entered a letter agreement containing terms pursuant to which BARM would forgo the sale to the third party. Those terms included, among others, (i) a initial payment of $240,000.00 to BARM, (ii) payment of an additional $450,000.00 within four months, by October 4, 2011, (iii) Barkany's agreement that the payments would be "comprised solely of funds provided by Mr. Joseph Rosenberg and Mrs. Lenore Zelinger (grandmother of Sarah Barkany) from borrowed funds or funds completely unrelated to Barkany" and (iv) Barkany's representation that "none of the funds to be paid to [BARM] … belong to, derive from, or are in any way the property of Gershon Barkany, his wife or any other current or former relative, affiliate, partner or business entity owned or controlled, directly or indirectly, by Mr. Barkany." In the June 6, 2011 agreement, Barkany was represented by counsel of his choice as the agreement recognized.

12. At or prior to the execution of the June 6, 2011 agreement, Barkany delivered a personal check payable to Locke Lord in the amount of $240,000.00. Subsequently, Barkany advised BARM that Rosenberg had intended to generate funds for the $450,000.00 payment due

[4] Copies of all agreements referenced in this Reply have been provided to the Trustee.

on October 4, 2011 by placing a mortgage on Barkany's residence, but the lien on the residence that Barkany had granted to BARM was delaying the closing of the mortgage. Barkany asked that BARM refrain from selling his residence to the third party and negotiated to increase the payment and extend the due date. Pursuant to the amended agreement, on or about October 25, 2011, Barkany delivered a personal check payable to Locke Lord in the amount of $50,000.00 and on November 4, 2011, Rosenberg wired $560,000.00 to Locke Lord's account.

13. At the time that BARM received these payments, BARM had no reason to believe anything other than that the payments had been made in compliance with the June 6, 2011 agreement's requirement that BARM be paid funds provided by Rosenberg or Mrs. Zelinger that were completely unrelated to Barkany. Subsequent to Barkany's arrest, Rosenberg testified in deposition that that Barkany had arranged for Saul Kessler and Charles Berger to provide $467,000.00 of the $560,000.00 that he wired to Locke Lord.[5] Neither Barkany nor Rosenberg, however, advised BARM at the time that the $560,000.00 was wired that the wired money may not Rosenberg's. That it may not have been Rosenberg's, however, does not change the fact that at the time that the payment was made BARM had no reason to suspect that it was not his. And, notwithstanding Rosenberg's testimony, it is not clear that the funds paid to BARM were not Rosenberg's.

14. Third tranche. In early 2013, BARM advised Barkany that it was preparing to take discovery of certain of his relatives, including Rosenberg and Jonathan Zelinger. Barkany

[5] Deposition of Joseph Rosenberg, 8/22/2013, pp. 39-40. More recently, in 2016, Rosenberg filed a Declaration in this case in which he stated that the "wire transfer was made by me for Mr. Barkany at his request, and was made with funds previously sent to me by Mr. Barkany and/or by third parties on Mr. Barkany's behalf." (No. 8-14-72941-las, ECF No. 359, ¶ 6). Thus, it appears that Rosenberg's story changed between 2013 and 2016, and now he says that the $93,000.00 that he attributed to himself in his deposition was provided by or on behalf of Barkany. An another discrepancy from Rosenberg's deposition testimony is found in an exhibit to Rosenberg's Declaration, in which he indicates that the $400,000.00 he attributed to Kessler in his deposition actually came from Alan Gerson.

then advised BARM that Rosenberg and Zelinger were interested in reaching a resolution of BARM's potential claims against them and other members of their family. At that time, because BARM had not yet obtained the 1,200 pages of records that Rosenberg and Zelinger would later produce, BARM had no knowledge of the extent of Rosenberg's and Zelinger's involvement with Barkany.

15. Barkany purported to negotiate the terms of a draft settlement agreement on behalf of Rosenberg and Zelinger. The draft settlement agreement, like the June 6, 2011 letter agreement described above, contains provisions designed to insure that BARM would receive only funds that were not related to Barkany or his fraud. Barkany advised BARM that Rosenberg and Zelinger were in the process of engaging counsel (he said that they were considering Kaye Scholer and Morrison Foerster) and were prepared to make certain good faith advance payments while the settlement was being finalized so that BARM would continue to defer commencement of discovery.

16. Thereafter, as Rosenberg has acknowledged, between February 13 and March 14, 2013, Rosenberg – not Barkany - hand delivered to BARM's counsel four cashier's checks totaling $170,000.00. And then, on or about March 14, 2013, Barkany delivered to BARM a cashier's check for $100,000.00. Only after Barkany's arrest did BARM learn that Barkany may have provided Rosenberg the funds with which he purchased the four cashier's checks that he delivered to BARM's counsel.[6] Even if that is true, at the time that BARM received the checks it believed that the funds were Rosenberg's and had no reason to suspect otherwise. Similarly with regard to the cashier's check delivered by Barkany, BARM had no reason to suspect that

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[6] No. 8-14-72941-las, ECF No. 359, ¶ 6, at ¶ 7 ("As was the case with the $560,000 wire transfer that I had wired to Locke Lord LLP Lord's account in November 2011, Mr. Barkany or persons acting on his behalf transferred to me the funds which Barkany then requested that I send to BARM in the form of the four cashier checks.").

Barkany was not abiding by BARM's requirement that only funds not related to Barkany or his fraud be provided.

17. In sum, Rosenberg argues that BARM knew or should have known that the funds provided by the foregoing transfers were tainted, even though Rosenberg, the person who acknowledged that he was doing Barkany's bidding, received most of these funds into his bank account, converted them to wires and cashier's checks and delivered them to BARM, and at the same time allowed Barkany to use Rosenberg's bank account to hide millions of other dollars that Barkany wanted transferred, claims to have had no knowledge of Barkany's fraudulent activities until he learned of Barkany's arrest. Rosenberg has demonstrated no facts tending to show that BARM knew or had reason to suspect that it was receiving anything other than clean funds. BARM had no such knowledge and no reason to suspect any of Rosenberg's activity to help Barkany to misappropriate funds. BARM submits that Rosenberg's should be rejected.

BARM has not received the alleged transfers from Schonberger, Canadian Northern and Hilman Partnership.

18. Paragraphs 3, 4 and 5 of the Objection alleged that Alfred Schonberger, the Canadian Northern group and the Ludvik and Eva Hilman Family Partnership made various transfers to or for the benefit of Barkany and that BARM received "close to $1 million" of those funds. In the almost three years that this case has been pending, this is the first allegation that Schonberger transferred funds at Barkany's request.[7] BARM received no direct transfers from

[7] Schonberger made an appearance in this bankruptcy case more than two years ago, on September 9, 2014. He has since filed various papers generally supporting Rosenberg's positions, but he has asserted only a contingent indemnity claim. His interest in this case appears to be the same as Rosenberg's, to stymie attempts to recover transfers that Barkany made to him.

Well before this bankruptcy commenced, Locke Lord was in contact with Schonberger's counsel, Motty Shulman, even deposing Mr. Shulman in 2012 about his having assisted Barkany in transferring funds to Barkany's sister in Israel. Yet, this is the first time that BARM has heard about Schonberger possibly having made transfers to Schonberger.

Schonberger, the Canadian Northern group or the Hilman Partnership, nor has it received direct transfers, and to this day it is not aware of receiving any indirect transfers, from the potential intermediate transferees identified in the objection – Molinaro Koger, Alan Gerson and Sarah Rosenberg – except for a transfer received from Gerson in March 2011, well before the alleged November 2011 and Summer 2012 transfers to Gerson.

19. Objectors additionally allege in their paragraph 6, again on "information and belief," that BARM received cash from Barkany and Morgan 86, Inc., one of Barkany's legal entities, that "may" have been fraudulently taken by Barkany, transferred to intermediaries, then back to Barkany and then to BARM. Objectors make these serious allegations without providing any detail. They allege no facts whatsoever, not even facts showing that these funds were fraudulently obtained by Barkany and then transferred to BARM. And most important of all, Objectors allege no facts that even hint that BARM did not act in good faith.

BARM is not an insider.

20. Without any citation of authority, at paragraph 7 of their Objection, the Objectors state, as they have stated before, that BARM is an insider and, thus, that the one year insider preference period applies to BARM. This contention has absolutely no merit.

21. The term "insider" is defined in Bankruptcy Code Section 101(31). In the context of this case, where the debtor is an individual, the statutory definition limits insiders to relatives of the debtor or of a general partner of the debtor, partnerships in which the debtor is a general partner, general partners of the debtor and corporations of which the debtor is a director, officer or person in control. However, courts have developed the non-statutory category of "insider by control." But "insider by control" is the unusual exception, not the rule. "The point of the insider definition is to invalidate the voting of a creditor who is so tied to or controlled by the

Debtor as to in effect be an alter-ego of the Debtor." *In re Blesi*, 43 B.R. 45, 48 (Bankr. D. Minn. 1984). "Insider by control" requires that the control "must be so overwhelming that there must be, to some extent, a merger of identity" or a "domination of [the debtor's] will." *In re Kids Creek Partners, L.P.*, 200 B.R. 996, 1016 (Bankr. N.D. Ill. 1996).

22. Rosenberg offers no facts to show that BARM or any of the BARM Parties had any control over Barkany. At all times, Barkany was free to do as he pleased. BARM respectfully submits that it is not an insider.

BARM's receipts of tax refunds are not avoidable as preferences.

23. Paragraph 7 of the Objection states that BARM received a number of vaguely specified transfers, but the Objection does not state what it considers to be problematic with most of them. Regarding tax refunds that BARM received, however, the Objection implies that refunds received during the one year prior to Rosenberg's and others' filing of the involuntary petition are avoidable as preferences. The Objection is mistaken.

24. In November 2012, Barkany assigned the tax refunds to BARM. Thus, insofar as the tax refunds are concerned, for the purpose of preference analysis the "transfer of an interest of the debtor in property" occurred well before even the one year preference period applicable to transfers to insiders. BARM understands that the Trustee agrees with it that the transfer of the tax refunds occurred in 2012 and thus cannot be recovered as a preference.

25. But even if the Trustee and BARM are incorrect and the "transfer of an interest of the debtor in property" with regard to the tax refunds occurred when BARM actually received cash, BARM's potential liability would be less than $500,000.00, not the $1.9 million alleged in the Objection. As demonstrated above, BARM is not an insider, which means that the preference period is ninety days. Even if Barkany had not executed the assignment, the amount

of tax refunds received by BARM in and after the beginning of the ninety day preference period was less than $500,000.00. BARM understands that the Trustee has also taken this into account.

BARM is not a custodian holding property of the estate.

26. At paragraph 8, Objectors state that BARM was acting as a custodian when it received assets from Barkany. This contention is not new. In fact, it is asserted in the complaint filed by former trustee Frankel to initiate this adversary proceeding.[8] The Trustee was aware of this contention when he decided to enter the proposed settlement and has stated in his reply that he considers it is weak at best. It has no merit.

27. Bankruptcy Code section 101(11) contains three subsections, each of which defines a custodian. Subsection (A) is not applicable, because BARM has not been "appointed in a case or proceeding not under this title." Subsection (B) is not applicable, because Barkany did not make "a general assignment for the benefit of the debtor's creditors."[9] Finally, subsection (C) is not applicable, because BARM is not "a trustee, receiver or agent under applicable law, or under a contract" and has not been "appointed or authorized to take charge of property of the debtor … for the purpose of general administration of such property for the benefit of the debtor's creditors." BARM's authority has been limited to acting with regard to specific assets transferred by Barkany to BARM, and thus owned by BARM and not Barkany, and to recovering and thereafter acting with regard to property that Barkany does not own because he conveyed such property to third parties, albeit fraudulently. Clearly, BARM has never been authorized to compel Barkany, or third parties in possession of Barkany's property, to

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[8] Adv. Pro. No. 8-16-08146-las, ECF No. 1, ¶¶ 42, 73-79.

[9] Under New York law, a general assignment for the benefit of creditors must (i) be in writing, (ii) state the residence and kind of business carried on by the debtor, (iii) be acknowledged before an officer authorized to take the acknowledgment of deeds, (iv) be recorded in the county clerk's office and (v) be accepted by the assignee in writing. NY Debtor & Creditor Law, § 3. None of those requirements are satisfied here.

turn Barkany's property over to BARM. Equally clearly, events subsequent to BARM's initial dealings with Barkany show that Barkany had no intention of turning over all of his assets to BARM. Even after acknowledging that he defrauded the BARM Parties, he continued to turn over millions of dollars to his relatives, and millions of dollars lost by the BARM Parties have never been accounted for.

28. Objectors err by premising their argument on their (untrue) allegation that BARM acted on behalf of all of Barkany's creditors. (*See* Objection at ¶¶ 2 ("for equal distribution among all of Barkany's creditors") and 8 (BARM and Locke Lord stated that they represent "'the creditors' of Gershon Barkany in their collection efforts")). But representation of creditors is not the essence of the statute's definition. Rather, "[e]ach of the enumerated categories describes a situation in which one holds property on behalf of the Debtor." *In re Moon*, 385 B.R. 541 (Bankr. S.D.N.Y. 2008). BARM has never held property on behalf of Barkany. It is not a custodian, and the property it has recovered is not property of the bankruptcy estate.

The bankruptcy estate has no interest in the assets recovered by BARM.

29. Paragraph 10 of the Objection states that BARM conceded in Summer 2016 that the bankruptcy estate has always had a continuing interest in the assets that Barkany transferred to BARM. The Objection does not cite any specific paper or transcript. If the Objectors are referring to the Litigation and Estate Funding Agreement, they are referring to an agreement that (i) was withdrawn and never became effective, (ii) expressly states that nothing therein shall be deemed an admission against a party's interest should the agreement not become effective, as is the case here, and (iii) is inadmissible pursuant to Federal Rule of Evidence 408 because it contains statements made in the conduct of settlement negotiations. Notwithstanding the

Objectors' bald assertion, the bankruptcy estate has no interest in the assets that BARM has recovered.

CONCLUSION

For the reasons stated above, BARM respectfully requests that the Court overrule the Objection and grant the motion seeking approval of the pending settlement, and grant such other and further relief as is just and proper.

Dated: March 22, 2017

Respectfully submitted,

/s/ *Alan H. Katz*

Shalom Jacob
Allen C. Wasserman
Alan H. Katz
LOCKE LORD LLP
Brookfield Place
200 Vesey Street, 20th Floor
New York, New York 10281
Telephone: (212) 415-8600
Facsimile: (212) 812-8370
Counsel to BARM Parties